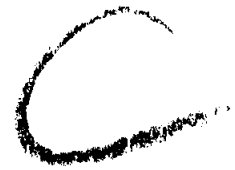


Nelson v One Hundred Forty Assocs., L.P.
2015 NY Slip Op 32529(U)
January 11, 2015
Supreme Court, Bronx County
Docket Number: 300675/14
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

-----X
REGINA A. NELSON,

Index No.: 300675/14

Plaintiff,

DECISION/ORDER

-against-

ONE HUNDRED FORTY ASSOCIATES, L.P. and
EUCLID HALL ASSOCIATES, L.P.,

Howard H. Sherman
J.S.C.

Defendants.

-----X
The following papers numbered 1 to 3 read on this motion noticed on October 15, 2014 and duly submitted on the Motion Calendar January 9, 2015.

Notice of Motion - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Upon the foregoing papers this motion by defendants for an order pursuant to CPLR 3211(a)(7), and (c) and 3212 (1) dismissing the complaint, is granted in part as set forth below.

Facts and Procedural Background

Plaintiff commenced this action in February 2014 seeking damages for personal injuries alleged to have been sustained in the course of her employment due to negligence in the ownership, maintenance, and control of premises known as Fania Gersham House, a housing development located at 140 West 105th Street, New York County, New York.

Issue was joined in April 2014 with the service of the answer of One Hundred Forty Associates, L.P. ("140 Associates") and Euclid Hall Associates, L.P. ("Euclid Hall"). Among the defenses asserted was that predicated on the exclusive remedy provisions of the Worker's Compensation Law, and it is here undisputed that plaintiff filed for an received worker's

compensation benefits in connection with the underlying accident.

Motion

140 Associates and Euclid Hall now move to dismiss the complaint against the former on the grounds that the action is barred by Worker's Compensation Law §§ 11 and 29 , and as to the latter, on the grounds that Euclid Hall is an improperly named party.

In support of the motion defendants submit the affidavit of Laura Jervis, Vice-President and Secretary of the Board of 140 Associates and Euclid Hall Housing Development Fund Company, Inc. ("EHHDFC"). In pertinent part, Jervis attests that 140 Associates was formed in 2006 to acquire and rehabilitate Fania Gersham House ("the residence")¹, and that West Side Federation for Senior and Supporting Housing ("WSFSSH") was retained as the building's property management company.² Jervis states that the agreement was in effect when plaintiff was hired as a porter at the residence, and at the time of the accident, and by its terms, the property manager was responsible for hiring employees who worked at the residence. Jervis states that also pursuant to the agreement, and with the exception of independent service contractors, all personnel hired to work at the residence were employees of 140 Associates, and all decisions regarding such personnel were to be made by the owner upon recommendation of the project manager, and the specific duties and responsibilities of plaintiff as a porter at the residence were outlined by 140 Associates. Jervis further states that payroll was processed through WSFSSH and that the audit file confirms plaintiff's salary as an expense incurred and paid for by the owner . Copies of plaintiff's time sheet and pay stub as well as a spreadsheet

¹ A copy of the 06/29/06 deed transferring the premises from WSA Housing Development Fund Company , Inc. to 140 Associates is annexed [Exhibit C1].

² A copy of the Property Management Agreement with 140 Associates' predecessor is also annexed [Exhibit C2].

entitled "Payroll -Audit Workpaper 2013" are annexed to the affidavits [Exhibits C4, 5, and 3].

With respect to Euclid Hall's status, Jervis states that it was a tax credit partnership that dissolved on May 9, 2013, and once dissolved, EHHDFC assumed ownership. As a result, at the time of the accident, Euclid Hall neither owned, nor maintained, nor operated or managed, nor repaired the residence, nor did it have obligation to do so, or any relationship with or ownership interest in 140 Associates.

Defendants argue that plaintiff was the "general employee" of 140 Associates and the "special employee" of WSFSSH, and as a result this action is barred as against 140 Associates, as her sole remedy against the owner is to pursue her already filed claim for Workers' Compensation benefits.

Concerning that branch of the motion addressed to defendant Euclid Hall, defendants maintain that plaintiff's claim of negligence devolving from Euclid Hall's ownership and/or control of the premises are without merit because at the time of the incident that entity had no such interest in the residence, and owed plaintiff no duty of care to maintain the premises.

By affirmation in opposition, plaintiff argues that she was employed by WSFSSH and received Workers' Compensation benefits in connection with the accident from WSFSSH's insurer.

It is argued that defendants have failed to meet their burden on the motion as they offer no evidence as to which entity, WSFSSH, or 140 Associates, directed the manner, details, and ultimate result of plaintiff's work. Annexed to the opposition papers are copies of a lien letter from the Workers' Compensation carrier, and a 05/31/13 "To Whom It May Concern" letter from WSFSSH confirming plaintiff's employment with the organization since June 24, 2011, as well as her status as being "on Worker's Compensation" due to a work-related incident, and copies of plaintiff's earnings statement, and the 2/13/13 Employer's Report of Work-Related Injury as

completed by WSFSSH [Workers' Compensation C-2 Form].

It is argued that the relationship between Euclid Hall and 140 Associates needs to be clarified in discovery , with the dissolution of the former entity being of no consequence as Euclid Hall was in existence on the date of the accident.

In reply, defendants argue that they have demonstrated by sworn affidavit and documentary evidence that plaintiff was an employee of 140 Associates , with the owner making personnel decisions, and having responsibility for her salary and benefits , and outlining her duties and responsibilities , and the unsworn documents submitted in opposition are insufficient to rebut this showing . Nor, defendants maintain , has plaintiff raised an issue of fact that Euclid Hall is a proper defendant, and offers no evidentiary basis for the contention that further discovery would lead to evidence relevant to that entity's ownership or control of the subject premises.

Housing Management Agreement

The agreement of September 26, 1987 between WSA Housing Development Fund Company, as owner, and, WSFSSH , as agent, provides for the following.

15. Employees . The Management Plan prescribes the number, qualifications and duties of he personnel to be regularly employed in the maintenance of the Project. *All such personnel will be employees of the Owner , unless furnished by an independent service contractor, as provided in paragraph 14 hereinabove, and will be hired , paid, supervised and discharged by the Agent , subject to the following conditions :*

- a. Compensation of bookkeeping, clerical ,and other managerial personnel will be within the Agent's sole discretion provided that minimum wage standards will be met.
- b. *The Owner will reimburse the Agent for compensation (including fringe benefits) payable to a program developer , security and maintenance employees , and director of social services, if any as prescribed in the Management Plan, and for all local, state ,*

and federal taxes, unemployment insurance, and workman's compensation insurance) incident to the employment of such personnel . Such reimbursement will be paid out of the Rental Agency Account and will be treated as Project Expenses [emphasis added] .

By Addendum to the Property Management Agreement, the agent agreed to comply with all provisions of the Management Plan for the Building .

The W.S. A. Housing Development Fund Corporation Management Plan³ in conformity with H.U.D. -provided guidelines, sets forth the the respective roles and responsibilities of the owner and the management agent, with the latter, inter alia, tasked to hire and train competent maintenance personnel, and to “advise (sic) project employees of their job responsibilities and duties”,and “insure effective performance by employees at all levels.”

Discussion and Conclusions

Upon a motion pursuant to CPLR 3211(a)(1) , “if the defendant[s’] evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate (see e.g. *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d 574, 971 NYS2d 48 [2d Dept 2013]; *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852, 955 NYS2d 109 [2d Dept 2012]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250, 767 NYS2d 418 [1st Dept 2003]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept 1996], lv denied 89 NY2d 802, 675 NE2d 1232, 653 NYS2d 279 [1996]; *Board of Managers of Fairways at N. Hills Condominium*, 150 AD2d 32, 545 NYS2d 343).” Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 134 , 980 N.Y.S.2d 21 [1st Dept. 2014]

³ Exhibit C2

A motion pursuant to CPLR 3211 (a) (7)

may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (see *Rovello*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314; *Guggenheimer*, 43 NY2d 268, 372 NE2d 17, 401 NYS2d 182; see also *Board of Managers of Fairways at N. Hills Condominium v Fairways at N. Hills*, 150 AD2d 32, 545 NYS2d 343 [2d Dept 1989]).

Id.

Under Worker's Compensation Law Sections 11 and 29 (6), a plaintiff's receipt of workers' compensation benefits as an employee is his or her exclusive remedy, which bars him or her from bringing a negligence action against his or her employer (see, Thompson v. Grumman Aerospace Corp., 78 N.Y.2d 553, 560, 585 N.E.2d 355, 578 N.Y.S.2d 106 (1991)).

[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. [T]he determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact.

Thompson, at 557-558

Upon review of the pleadings here, and accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible inference (see, Leon v Martinez, 84 NY2d 83, 87-88, 638 NE2d 511 [1994]), it is the finding of this court that defendants have failed to sustain their burden on the motion as the documentary proof on which they rely, most particularly, the Management Agreement, does not, as argued, dispositively

establish the asserted defense, i.e., that 140 Associates, like the property owner in Karczewicz v. 473 Owners Corp., 272 A.D.2d 137, 708 NYS2d 10 [1st Dept. 2000] , cited as authority here, had the “exclusive authority to hire [plaintiff], supervised and controlled [her] work and paid [her].” While the management agreement’s express statement on the issue is a factor to be considered , it is not the sole determinative (see, Thompson , supra at 559; see also, Bautista v. David Frankel Realty , Inc., 54 A.D.3d 549,554 83 NYS2d 638 [1st Dept. 2008]). Here, the same agreement denominating plaintiff an employee of the owner, also states that her work will be supervised by the managing agent. Defendants come forward with no evidence on the salient issue of control and direction of the manner, and the details of plaintiff’s day-to-day employment, and without such evidence the court cannot make a finding that plaintiff has not stated a cognizable claim.

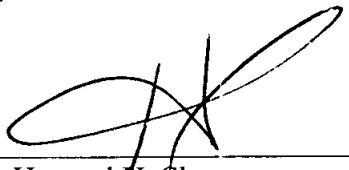
Defendants have established their entitlement to relief with respect to the claims asserted against co-defendant Euclid Hall , and in opposition, no evidentiary basis is offered to suggest that further discovery may lead to relevant evidence of that entity’s ownership and /or control of the subject premises.

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of dismissing the claims as asserted against Euclid Hall Associates, L.P., and is otherwise denied.

This constitutes the decision and order of this court.

Dated: January 11, 2015
Bronx, New York



Howard H. Sherman
J.S.C.